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In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN CUNEO, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in circumstances where petitioner's refusal to recognize a union on the basis of authorization cards from a majority of the unit employees was itself an unfair labor practice because at the moment of the demand for recognition the petitioner began a series of serious and pervasive unfair labor practices that precluded the holding of a fair election, employees who struck in protest of the refusal to recognize the union are properly deemed to be unfair labor practice, rather than economic, strikers.

2. Whether substantial evidence supports the Board's finding that petitioner's unfair labor practices warranted the issuance of a bargaining order.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	14
Conclusion	22

TABLE OF AUTHORITIES

Cases:

Alumbaugh Coal Co. v. *NLRB*, 635 F.2d 1380 15
Drug Package Co., 228 NLRB 108, enf'd as modified, 570 F.2d 1340, on remand, 241 N.L.R.B. 330 ..... 6, 7, 13, 15
Drug Package Inc. v. *NLRB*, 570 F.2d 1340 14
Laidlaw Corp., 171 N.L.R.B. 1366, enf'd, 414 F.2d 99, cert. denied, 397 U.S. 920 20
NLRB v. *Fleetwood Trailer Co.*, 389 U.S. 375 ..... 9, 16, 20
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 ..... 6, 9, 13, 19
NLRB v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056 16
NLRB v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333 9
Philip Carey Mfg. Co., Miami Cabinet Div. v. *NLRB*, 331 F.2d 720, cert. denied, 379 U.S. 888 16
Trading Port Inc., 219 N.L.R.B. 298 11
Woelke & Romero Framing, Inc. v. *NLRB*, No. 80-1798 (May 24, 1982) 15

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 8(a)(1), 29 U.S.C. 158(a)(1) 5, 6, 7, 8, 17
Section 8(a)(3), 29 U.S.C. 158(a)(3) 5, 8
Section 8(a)(5), 29 U.S.C. 158(a)(5) 6, 7, 11, 14, 15, 17
Section 10(e), 29 U.S.C. 160(e) 15

Miscellaneous: Page

Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 Va. L. Rev. 1322 (1959).. 16
Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 49 Va. L. Rev. 1297 (1963).. 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-30) is reported at 681 F.2d 11. The decision and order of the National Labor Relations Board (Pet. App. A-31 to A-76) are reported at 253 N.L.R.B. 1025.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1982. The petition for a writ of certiorari was filed on September 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 15, 1977, 11 of petitioner's 14 fabrication shop employees signed cards authorizing Road Sprinkler Fitters Local Union No. 669, U.A. ("the Union") to be their collective bargaining representative (Pet. App. A-32, A-50). The next day two Union representatives informed petitioner's president, Bob Splawn, that a majority of the employees had authorized the Union to represent them and requested that petitioner recognize and bargain with the Union (Pet. App. A-32, A-51). Splawn refused, telling the Union to go to the National Labor Relations Board (Pet. App. A-32 to A-33, A-51).[1]

After Splawn refused the demand for recognition, he called employee Gerald Hall into his office and questioned him as to his knowledge of the organizational drive and his views regarding the union activity. Hall replied that he did not wish to discuss these matters (Pet. App. A-33, A-51). Later the same day, September 16, Hall was again summoned to Splawn's office in the presence of an attorney representing petitioner. Hall was again asked "what he knew about the Union." Hall again declined to respond. The attorney then asked Hall a series of questions designed to establish his possible status as a supervisor under the Act and asked Hall to sign a statement avowing that he was a supervisor. Hall refused and was told to consider the matter further over the ensuing weekend (Pet. App. A-33, A-51 to A-52).

Following the second meeting with Hall on September 16, Supervisor Ray Collins was called into Splawn's office, queried about his knowledge of who

[1] The Union filed an election petition on that same day (Pet. App. 51 n.7).

had signed authorization cards, and was instructed to discover the identity of the signers (Pet. App. A-33, A-52). After that meeting, Collins told employee Ted Hall that Splawn had ordered him to find out what he could about the Union, including the identities of employees who had signed authorization cards (Pet. App. A-33 & n.3).

On Tuesday, September 20, Gerald Hall was called into Splawn's office for a third meeting. Splawn again asked Hall to tell him about the union activity and to sign the statement saying he was a supervisor. Hall refused. Splawn then warned Hall that if he did not sign he would be terminated. Hall responded that he would just have to be fired, and he left the meeting. After being assured that Splawn did not really wish to fire him, Hall returned to Splawn's office. After some conversation concerning the benefits of unionization, Hall agreed to sign the statement. Subsequently, Hall signed an additional statement, which he had not read, avowing that he had encouraged other employees to sign authorization cards (Pet. App. A-33, A-52 to A-53).

Meanwhile, on September 20, the employees met and agreed that they would walk out on strike the following day if petitioner still refused to recognize and bargain with the Union (Pet. App. A-33, A-56). The next day, September 21, Union representatives visited President Splawn and repeated their demand for recognition and bargaining. Splawn refused recognition and referred the union representatives to his attorney. Shortly thereafter, eight of the ten-day shift employees walked out and began picketing petitioner (Pet. App. A-33 to A-34, A-56). Within an hour after the strike began, President Splawn came to the picket line, counted the striking employees, and announced that they would be permanently replaced

if they did not abandon the strike and return to their jobs within 15 minutes. The employees ignored Splawn's declaration and continued to picket (Pet. App. A-56). They were joined that evening by three of the night shift employees, as well as by Gerald Hall and Supervisor Ray Collins, who had quit their jobs (Pet. App. A-34, A-56).

On September 22, petitioner hired a Pinkerton guard who photographed the picket line (Pet. App. A-57). The following day, an attorney representing petitioner also photographed the pickets (Pet. App. A-34, A-57). Additionally, on October 14, petitioner's superintendent took photographs of employee Talkington while he was peacefully picketing a location where petitioner had an installation crew working (Pet. App. A-57).

The strike continued until November 14, when the Union's business manager forwarded to Splawn unconditional offers to end the strike and return to work from seven of the strikers. None of these seven employees was immediately offered reinstatement (Pet. App. A-34 to A-35, A-61).[2]

Prior to the onset of union activity, petitioner had established no fixed policy regarding employee tardiness and employees were not disciplined for being tardy. However, after strikers Bowes and Worley returned to their jobs in February 1978 (see note 2, *supra*), they were told by Foreman Ricky Kilgore that "if [they] were late three times, [they] would be

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[2] Thus, Christopher Bowes and David Worley were not reinstated until February 1, 1978; Donald Gregg was not reinstated until February 20, 1978; and Stan Ray not until June 23, 1978. As of the commencement of the hearing in this case, neither Melvin Talkington nor Jerry Brite had been offered reinstatement. Brite was offered reinstatement during the hearing (Pet. App. A-36 to A-37).

fired." Subsequently, after Bowes and Worley had been tardy on two occasions Kilgore said, "[T]hat's two times, you got one more try." The new rule was applied only to reinstated strikers; other employees who had neither struck nor supported the Union were not disciplined when tardy (C.A. App. 428, 459).[3] President Splawn also told Bowes and Worley that they were not to talk about the Union on the job (Pet. App. A-34, A-61 to A-62; C.A. App. 427-428, 458-459, 467-468).

2. The Board found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interrogating employee Gerald Hall three separate times (Pet. App. A-33, A-55); by creating the impression of surveillance of its employees' union activities through Supervisor Collins' conversation with Ted Hall (*ibid.*); by engaging in surveillance through its photographing of peaceful picketing (Pet. App. A-34, A-58); by promulgating a rule prohibiting employees from engaging in union discussion at any time on petitioner's premises (Pet. App. A-34, A-61 to A-62); and by threatening employee Gerald Hall with discharge if he failed to sign the statement saying that he was a supervisor (Pet. App. A-39). The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by instituting and enforcing a new progressive disciplinary system for tardiness to discourage membership in the Union, and by failing to reinstate the strikers as required by law (Pet. App. A-34 to A-35, A-62).

In view of petitioner's deliberate course of unlawful conduct designed to stifle further union activity and calculated to preclude holding of a fair repre-

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[3] "C.A. App." denotes the printed appendix filed in the court of appeals.

sentational election, which commenced on the date of the union's request for recognition, the Board determined that petitioner's refusal to recognize the Union on the date of its demand, September 16, violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and that a bargaining order was warranted. The Board further concluded that the ensuing strike was an unfair labor practice strike and that petitioner violated the Act by refusing to immediately reinstate the strikers upon their unconditional November 14 offer to return to work (Pet. App. A-35 to A-39, A-40 to A-41).

In issuing a bargaining order, the Board found that petitioner's unfair labor practices "were sufficiently serious and pervasive in character to preclude the holding of a fair election and to warrant the issuance of a bargaining order" under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) (Pet. App. A-37). The Board noted that 7 of the 14 original unit employees had been subjected to discriminatory practices and, "[i]n view of the small size of the unit and the severity of the discriminatory practices, it is not unreasonable to infer that other employees were aware of [petitioner's] unlawful conduct against their coworkers" (Pet. App. A-38). The Board added that, "almost from the moment it learned of its employees' support for the Union, [petitioner] embarked on an unlawful course of conduct designed to stifle further union activity" (*ibid.*).

In determining that the recognitional strike was an unfair labor practice strike, the Board relied upon its decision in *Drug Package Co.*, 228 NLRB 108, 112 (1977), enf'd as modified, 570 F.2d 1340 (8th Cir. 1978), on remand, 241 N.L.R.B. 330 (1979).[4] In *Drug*

[4] An Administrative Law Judge had concluded (Pet. App. A-64 to A-66) that because the unit employees were aware

Package Co., 228 N.L.R.B. at 112, the Board had explained that a recognitional strike is to be treated as an unfair labor practice strike when nonrecognition is unlawful because "the employer engaged in contemporaneous widespread illegal conduct designed to frustrate the statutory scheme [for determining representation through elections], and bargaining in particular." Here the Board concluded that the pervasive unfair labor practices committed by petitioner at the inception of the recognitional campaign met this test and accordingly rendered petitioner's withholding of recognition and refusal to bargain on September 16, 1977, unlawful under Section 8(a)(5). The Board thus concluded that "upon the [employees'] unconditional offer to return to work on November 14 [petitioner] had an obligation to reinstate the employees as unfair labor practice strikers" (Pet. App. A-39).

The Board's remedial order directed petitioner to cease and desist from its unlawful practices, to recog-

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of petitioner's pervasive violations of Section 8(a)(1) that occurred prior to the commencement of the strike on September 21 (see pages 3-5, *supra*), their strike was an unfair labor practice strike. The Board rejected this reasoning, although not the ultimate conclusion (Pet. App. A-35 to A-41). The Board set forth its view (*id.* at A-35) that "an unfair labor practice strike does not result merely because unfair labor practices precede the strike. Rather, there must be a causal connection between the two events which demonstrates that the strike is the direct outcome of the unfair labor practices." The Board explained that the record in this case showed that the strike was commenced to secure recognition, rather than in response to petitioner's violations of Section 8(a)(1) (*id.* at A-35 to A-36). The Board accordingly concluded that "whether the strike was an unfair labor practice strike depends on whether it can be so classified under the Board's decision in [*Drug Package*]" (*id.* at A-36).

nize and bargain with the union retroactively from the date of the initial refusal to accord recognition, to offer immediate and full reinstatement to the strikers and to make them whole for any loss of earnings in the period during which reinstatement had been withheld, to abolish its rule precluding discussion about the union at the workplace, and to rescind its discriminatory disciplinary system (Pet. App. A-40 to A-44).

3. The court of appeals (Pet. App. A-1 to A-30) upheld the Board's decision and enforced its remedial order, concluding that the Board's factual findings were supported by substantial evidence (Pet. App. A-3 n.1), and that its legal conclusions were sound.

Initially (Pet. App. A-9 to A-16), the court of appeals upheld the Board's determinations respecting petitioner's unfair labor practices committed in violation of Sections 8(a)(1) and 8(a)(3) of the Act —the coercive interrogation of, and threat to discharge, Gerald Hall,[5] the coercive surveillance of employees' union activities that was unsupported by any legitimate purpose, the failure to reinstate strikers willing to return even when vacancies were available,[6]

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[5] The court upheld the Board's determination that Hall was not a supervisor (Pet. App. A-10 to A-11). Petitioner had not otherwise contested the Board's determination that this conduct was an unfair labor practice.

[6] The court of appeals agreed with the Board (and thus disagreed with the Administrative Law Judge) (see page 6 note 4, *supra*) that the strike was a recognitional strike, rather than one designed to redress the Section 8(a)(1) unfair labor practices committed by petitioner in response to the union's request for recognition (Pet. App. A-13). Because a strike for recognition is ordinarily (*i.e.*, absent circumstances that make nonrecognition itself an unfair labor practice) an economic strike, rather than an unfair labor practice strike, the court of appeals assumed for the purposes

the institution of a "no-union-talk" rule, and the adoption and discriminatory application of a disciplinary system for the purpose of discouraging union membership. As to each violation, the court of appeals determined that the Board's finding was supported by substantial evidence and its legal conclusions consistent with settled precedent (Pet. App. A-9).[7]

Turning to the Board's remedial order and the reasoning underlying it, the court of appeals agreed first with the Board that the conditions for issuance of a bargaining order outlined by this Court in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), were

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of discussion of the reinstatement issue that the strikers were economic strikers. The court recognized that, unlike unfair labor practice strikers, who are entitled to immediate reinstatement upon making an unconditional offer to return to work even if that requires displacement of "permanent" replacements, economic strikers are entitled to reinstatement only when an opening not filled by a permanent replacement exists. Compare *NLRB* v. *MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938), with *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 380-381 (1975). Because the evidence supported the Board's conclusion that petitioner had not rehired all of the strikers even when vacancies were available, the court of appeals concluded that even regarding them as economic strikers petitioner's failure to reinstate the returning employees was an unfair labor practice (Pet. App. A-13 to A-15 & n.10). As discussed below (pages 11-14), the court of appeals treated separately the question whether the employees were in fact unfair labor practice strikers in this case. Because it concluded that they were, it ultimately ordered payment of backpay for the entire period following their offers to return to work.

[7] The court of appeals also upheld (Pet. App. A-9 n.6) the Board's dismissal (*id.* at A-58 to A-61, A-62 to A-63) of the portions of the complaint alleging that the discharge of one employee and interrogation of another were unlawful. No issue concerning those aspects of the case is presented here.

satisfied here (Pet. App. A-17 to A-22). Thus the court upheld the Board's conclusion that the authorization cards signed by employees in this case were reliable indicators of majority support for the union, finding no evidentiary support for petitioner's contention that the cards had been procured in an improper or unreliable manner (*id.* at A-17 to A-19). The court also agreed with the Board that the unfair labor practices committed by petitioner were sufficiently serious to undermine the union's majority and thus to undercut the reliability of the normal electoral process for determining representation. The court of appeals noted (Pet. App. A-20):

> [c]ourt and board cases often have viewed unfair labor practices similar to the ones in this case—interrogation, threatened discharge, surveillance, discriminatory application of work rules—as conduct which supports the issuance of a bargaining order. * * * In addition, the Company's delayed reinstatement of the striking employees was a particularly serious unfair labor practice.

The court also concluded that the Board had not abused its remedial discretion, resting upon application of its expertise, by determining, as *Gissel* requires, that the petitioner's unfair labor practices were so serious and pervasive that the possibility of arranging an election that would accurately reflect the desires of the employees was slight and that the union's majority status was therefore best to be determined by reference to the authorization cards (*id.* at A-20 to A-22).

Next, the court of appeals sustained the retroactivity feature of the Board's bargaining order (Pet. App. A-22 to A-23). The court upheld the Board's

conclusion that, because petitioner had simultaneously engaged in a course of illegal conduct that undercut the normal electoral process for determining a union's majority status, petitioner's withholding of recognition was, from the inception, itself an unfair labor practice violative of Section 8(a)(5) of the Act. The court thus approved the Board's rule, announced in *Trading Port Inc.*, 219 N.L.R.B. 298 (1975), of making bargaining orders retroactive so as to remove any incentive for employers to engage in unfair labor practices in order to postpone an election and thereby retain for an extra time the ability to make unilateral decisions affecting employees.[8]

Finally, the court of appeals upheld the Board's *Drug Package* rule and its application to this case (Pet. App. A-24 to A-30), agreeing that in the circumstances presented, the strikers were properly treated as unfair labor practice strikers, entitled to immediate reinstatement once they had offered to

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[8] In *Trading Port, Inc., supra*, the Board had held that *Gissel* bargaining orders would be retroactive to the later of the date on which the union achieved majority status and the date on which the employer commenced its unfair labor practices. The court below approved that policy "where, as here, the union had majority support within the bargaining unit, the employer refused to bargain with the union, and the employer engaged in serious and pervasive unfair labor practices sufficient to justify a bargaining order under *Gissel*" (Pet. App. A-23). Because the Union had requested recognition prior to the commencement of petitioner's unfair labor practices the court did not decide whether a retroactive order would have been appropriate in the absence of a request for recognition, or whether a bargaining order may be made retroactive to a date prior to a demand for recognition where the union achieves a majority and the employer commences unfair labor practices prior to a demand for recognition (Pet. App. A-23 to A-24 n.18).

return to work. The court explained (Pet. App. A-25 to A-26):

> In one sense, the treatment of striking employees as unfair labor practice strikers under the circumstances of *Drug Package* and of this case follows by simple logic from the imposition of a retroactive bargaining order. Concomitant with the imposition of the retroactive bargaining order is a conclusion that the employer's refusal to recognize and bargain with the majority union was a violation of section 8(a)(5). * * * Since the employer committed an unfair labor practice in its refusal to recognize the union, and since the employees then struck for recognition, the employees' "absence from the workplace [was] prompted by employer conduct that [was] found to constitute an unfair labor practice." * * * Hence, the employees were unfair labor practice strikers.

The court added that "[t]he *Drug Package* doctrine is also warranted by well-recognized policies of the Act" (Pet. App. A-26). The court noted that an employer is not required to recognize a union which presents authorization cards from a majority of the unit employees, but may insist on a Board-conducted representation election, and that a union is then free to strike for recognition in the hope that this tactic "will shorten the route to recognition and bargaining" (Pet. App. A-27). The court explained, however (*ibid.*):

> If the employer exceeds its legal rights and embarks on an unlawful campaign to undermine the union's support, it may injure the employees' protected interests in at least two distinct ways. First, the employer's unfair labor practices may prevent the employees from freely expressing

their union preferences in a Board conducted election.

Injury of this first kind, the court of appeals noted, may be redressed in appropriate circumstances by issuance of a *Gissel* bargaining order. The court explained, however, that unlawful employer conduct may cause a second type of injury to employees that is not redressed by a *Gissel* bargaining order (Pet. App. A-28; footnote omitted):

> Second, the employer's illegal conduct may cause excessive economic harm to employees who have participated in a lawful strike for recognition. As noted above, when a union demands recognition, the employer has two lawful options. The employer may recognize and bargain with the union, in which case no strike for recognition will follow. Alternatively, the employer may refuse to recognize the union and await the outcome of a Board election. If the employer does not impede the electoral process, the recognitional strike should last no longer than the date of the election. If, however, the employer rejects these lawful alternatives and undermines or prevents an election, the strike likely will be prolonged as a consequence of activity that is clearly forbidden by the Act. In other words, the employees' continued strike, and continued loss of earnings, would result directly from their employer's illegal conduct.[9]

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[9] The court cautioned that it expressed no view as to the applicability of *Drug Package* to cases in which a recognitional strike antedates the employer's refusal to bargain, or in which the employer's unfair labor practices begin after the employees have offered to return to work (Pet. App. A-29 n.22)—circumstances not present here. The court declared (*ibid.*): "We assume that the Board will apply *Drug Package* in different cases judiciously, keeping in mind that its orders may not be punitive."

Finally, the court rejected petitioner's contention that the Board's policy was punitive rather than remedial (Pet. App. A-29 to A-30). Since an employer's unfair labor practices may extend a strike beyond the time when it would have ended pursuant to the operation of the Board's election processes, the employees would not be made whole absent a reinstatement order, the court explained. "Similarly, the Board may properly conclude that the employer has forfeited its right to hire permanent replacements for its striking employees when their absence from work stems from the employer's unlawful impairment of the electoral process" (*id.* at 29). The court of appeals thus concluded that "[t]he *Drug Package* doctrine * * * lies within the broad remedial discretion that Congress gave to the Board," as recognized by this Court (*id.* at 29-30).

ARGUMENT

As the court of appeals explained in its careful and well-reasoned opinion, upon which we rely, the Board's *Drug Package* rule, and its application in this case are consistent with the decisions of this Court and the provisions and policies of the Act. The decision of the court of appeals, moreover, does not conflict with any decision of any court of appeals.[10] Indeed, petitioner

[10] In *Drug Package Inc.* v. *NLRB*, 570 F.2d 1340 (8th Cir. 1978), itself, the court rejected the Board's finding of a Section 8(a)(5) refusal to bargain violation because it had not been litigated in the proceeding before the Board (*id.* at 1345-1346). The court similarly refused to make retroactive the *Gissel* bargaining order, which it upheld in other respects, reasoning that application of the Board's *Trading Port* retroactivity policy would be unfair because "[b]oth the hearing and crucial actions by the parties occurred prior to the Board's decision in *Trading Port*" (*id.* at 1346). Because it had rejected the Board's refusal to bargain finding, the court

does not suggest otherwise. Further review is accordingly unwarranted. In any event, as we explain below, petitioner's submission is based upon a mischaracterization of the decisions of the court of appeals and of the Board, confuses the various issues decided by the court, and is otherwise without merit.[11]

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also rejected the Board's finding that the strike was an unfair labor practice strike (*id.* at 1347-1348), noting that "[t]he finding of an 8(a)(5) violation is a crucial step in the Board's reasoning." The court remanded the case to the Board to determine whether the strikers nevertheless should be entitled to reinstatement in order to make the bargaining order meaningful (*id.* at 1348-1349). Accepting the remand as the law of the case, the Board held that, in the particular circumstances, reinstatement of the strikers was necessary to give meaning to the bargaining order. 241 N.L.R.B. 330, 331-332 (1979).

As the court of appeals below noted (Pet. App. A-25 n.19), the unfairness perceived by the Eighth Circuit in *Drug Package* does not exist here; that court has, subsequent to *Drug Package*, upheld the imposition of a retroactive bargaining order in *Alumbaugh Coal Co.* v. *NLRB*, 635 F.2d 1380, 1386 (8th Cir. 1980). Of course, petitioner's violation of Section 8(a)(5) here was fully litigated and properly determined; so nothing in the Eighth Circuit's *Drug Package* decision calls in question the decision of the court of appeals in this case.

[11] We note as well that the primary arguments advanced in this Court by petitioner (see Pet. 7-9) were not advanced before the Board; neither did petitioner challenge the Board's *Trading Port* and *Drug Package* doctrines generally. Judicial review of petitioner's contentions accordingly is barred by Section 10(e) of the Act, 29 U.S.C. 160(e). See *Woelke & Romero Framing, Inc.* v. *NLRB*, No. 80-1798 (May 24, 1982), slip op. 20-21. In contrast with *Woelke & Romero*, moreover, petitioner did file a motion for reconsideration before the Board here, but its argument on that occasion assumed the validity of the *Drug Package* rule and contended only that the facts of this case did not show pervasive and wide-ranging unfair labor practices sufficient to trigger application of the

1. Petitioner does not directly question the Board's *Drug Package* doctrine or the related *Trading Port* rule. Rather, petitioner contends (Pet. 7) that, by issuing a retroactive bargaining order and deeming the strikers to be unfair labor practice strikers, the Board has "ma[d]e[] a shambles of the doctrine of striker reinstatement rights as enunciated by this Court," improperly depriving it of its right to hire permanent replacements for economic strikers (see pages 8-9 note 6, *supra*) because "[w]hen the strike began on September 21, it began as an economic strike" and "[n]othing occurred during the strike to change it from an economic strike to an unfair labor practice strike" (Pet. 7).[12] There is no merit to these contentions.

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rule. We note that petitioner did not even raise the arguments now advanced in the court of appeals; rather that court addressed them sua sponte. For these reasons the questions now presented are not properly before the Court.

[12] An economic strike is one called to exact economic concessions. See, *e.g.*, *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967). An unfair labor practice strike is one called in response to an employer's violation of the NLRA. If, during an economic strike, an employer commits what the Board later determines to be an unfair labor practice and the union continues the strike beyond its natural duration to protest that practice, the strike is converted into an unfair labor practice strike. In such circumstances, the strikers become unfair labor practice strikers on the date of the conversion. If they subsequently make an unconditional offer to return to work, they are entitled to immediate reinstatement if they had not been permanently replaced before the strike's conversion. *Philip Carey Mfg. Co., Miami Cabinet Div.* v. *NLRB*, 331 F.2d 720, 729 (6th Cir.), cert. denied, 379 U.S. 888 (1964); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1061 (10th Cir. 1971). See Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 Va. L. Rev. 1322 (1959); 49 Va. L. Rev. 1297 (1963).

a. Petitioner errs in stating (Pet. 7) that when the strike began on September 21, it was an economic strike and misrepresents the determination of the Board and court of appeals by implying (*ibid.*) that they endorsed that characterization. Rather, as is explained above (pages 6-7, 8 note 6, 11-12), the ultimate conclusion of both Board and court was that the strike was *from its inception* an unfair labor practice strike. Although the Board and court of appeals rejected the ALJ's finding that the strike was a response to petitioner's unfair labor practices in violation of Section 8(a)(1) (see pages 6-7 note 4, *supra*), concluding that the strike was recognitional in nature, both also concluded that because petitioner's nonrecognition of the union was, in the circumstances of this case, a violation of Section 8(a)(5), the recognitional strike was an unfair labor practice strike. And the Board and court of appeals agreed that the strike must be so characterized from its very inception because from the moment union activity began, it was met with a course of serious and pervasive unfair labor practices that had the purpose and effect of undermining the union majority and the representation election process itself. Petitioner's assertion (Pet. 7) that nothing happened during the strike to convert it from an economic strike to an unfair labor practice strike simply ignores the actual reasoning and decision of the court of appeals and the Board.

Given the actual reasoning adopted by the Board and court of appeals there is no substance whatever to petitioner's claim that the settled rules governing reinstatement rights have been disturbed. Rather, the *Drug Package* rule applied here entails no more than the insight that refusal to recognize a union based upon authorization cards under circumstances where the alternative means of fairly ascertaining majority

status—an election—is willfully obstructed, is an unfair labor practice. The reinstatement rights of strikers for recognition are accordingly the rights of unfair labor practice strikers in these circumstances.

b. Petitioner errs as well in asserting (Pet. 7, 8) that the single unfair labor practice that warranted imposition of the bargaining order was the one that occurred *after* the strike was over—failure promptly to reinstate the strikers. Rather, as indicated above (pages 6 & 10), both the Board and the court relied upon petitioner's entire course of conduct in determining that a bargaining order was warranted. Contrary to petitioner's suggestion (Pet. 8) that its reinstatement violations "undoubtedly tipped the scales for the *Gissel* order," the court of appeals' opinion makes clear (Pet. App. A-20; see page 10, *supra*) that petitioner's unfair labor practices—coercive interrogation, threatened discharge, coercive surveillance and discriminatory application of work rules—each were of a kind that would support issuance of a bargaining order. Of course petitioner's coercive interrogation and its threat to discharge Gerald Hall, and one of its acts of surveillance occurred before the strike began, and the remaining acts of unlawful surveillance occurred before the strike ended.

c. Contrary to petitioner's assertion (Pet. 9), the *Drug Package* rule was not prompted by considerations of "administrative convenience," but by the need to devise an effective remedy for the employer's frustration of the election process.[13] The rule is a reason-

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[13] Because, as we explain above (page 17), neither the Board's decision nor the court of appeals' decision rests upon any notion that an economic strike was somehow converted into an unfair labor practice strike at some point after its inception, petitioner's argument is unresponsive to the actual holding of this case.

able means of making employees whole for prolongation of the strike caused by the employer's frustration of the election process and serves the "goal [of] * * * deterring employer misbehavior" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 614) by precluding hiring of permanent replacements for strikers by an employer that commits serious and pervasive unfair labor practices that undermine the representation election process and thereby render unlawful the employer's refusal to recognize a union which obtained valid authorization cards from a majority of its employees, which refusal has, in turn, prompted a recognitional strike.

2. Petitioner suggests, finally, that this Court "should also consider whether the record as a whole contains substantial evidence to support the Board's bargaining order" (Pet. 10). Remarkably, petitioner does not even argue the negative of this proposition. And the court of appeals' opinion carefully and correctly applies this Court's decision in *Gissel* to the facts of the instant case.

Petitioner's only specific contention respecting the adequacy of the record is that its Exhibit 11 (C.A. App. 132), on which the Board based its finding (Pet. App. A-36 to A-37) that petitioner had not offered vacancies to strikers who offered to return to work even when vacancies arose, was cast in an unfair light by the Board. Of course, as is noted above (page 18), there is no reason to believe that the Board's or court of appeals' decisions respecting the bargaining order depends upon this particular unfair labor practice finding. In any event, contrary to petitioner's suggestion, the Board's finding in this respect does not depend upon the Board's comment (*ibid.*)—which petitioner seems to endorse—that its exhibit was incomplete. Rather, the Board's finding rests upon the fact

that petitioner's exhibit affirmatively demonstrates that there were vacant positions available after the time that the strikers offered to return to work that were not offered to the strikers (see Pet. App. A-37). We note, moreover, that even now petitioner does not claim that the Board's finding or its own Exhibit was inaccurate in this respect. Petitioner merely seeks a remand to allow submission of unspecified evidence bearing upon Exhibit 11. Plainly this matter does not warrant this Court's review.[14]

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[14] There is no merit to petitioner's suggestion (Pet. 10) that, because of the Board's rejection of the ALJ's *reasons* for concluding that the strike was, from its inception, an unfair labor practice strike (see page 6 note 4, *supra*), it was somehow unfairly taken by surprise by the Board's reliance upon Exhibit 11. The Board's ultimate conclusion remained the same as the ALJ's and thus in the final analysis nothing turned upon the Board's, or the court of appeals' (see page 8 note 6, *supra*), intermediate conclusion that petitioner had unlawfully delayed reinstatement, even if the strike were deemed purely economic. In any event, petitioner had every incentive throughout all phases of the Board proceedings to perfect the record respecting reinstatement and vacancies, for petitioner argued throughout that the strike was economic and that it had not committed any unfair labor practice respecting reinstatement (see Pet. App. A-64). As the court of appeals noted (Pet. App. A-14), the employer bears the burden of showing that economic strikers were permanently replaced and that no vacancies were available. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369 (1968), enf'd, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970). Thus, petitioner can only blame itself if it presented incomplete or misleading evidence in the Board's proceedings. We note that while petitioner quarreled with the Board's discussion of Exhibit 11 in its motion to reconsider (see page 15 note 20, *supra*)—suggesting that the Board's observation that the Exhibit was incomplete was somehow

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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unfair, as we have explained above (page 20) that observation was not the basis of the Board's decision. Petitioner's motion for reconsideration—like its petition in this Court—did not assert that the Board's factual determination was erroneous.

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